IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.09.2005

CORAM

THE HONOURABLE MR JUSTICE M.CHOCKALINGAM

Second Appeal Nos. 1370 and 1371 of 2003
and
C.M.P.Nos.12185 and 12186 of 2003 and 13787 of 2005

V.V.Palanisamy ... Appellant in both the appeals.

Vs

V.V.Natarajan ... Respondent in both the appeals.

Prayer: Appeals against the judgment and decree dated 28.2.2003 made in A.S.Nos. 141 and 142 of 2002 by the learned II Additional District Judge, Coimbatore, confirming the judgment and decree dated 23.07.2002 made in O.S.Nos. 6 of 2001 and 114 of 2000 on the file of the learned District Munsif, Mettupalayam.

For Appellant : Mr.V.K.Muthusamy, S.C. for M/s.K.Kalyanasundaram

For Respondent : Mr.Srinath Sridevan

ORDER

These two second appeals have arisen from the common judgment of the learned Second Additional District Judge, Coimbatore, made in A.S.Nos.141 and 142 of 2002, which were preferred challenging the judgments of the trial Court made in O.S.Nos.6 of 2001 and 114 of 2000.

2. The plaintiff in O.S.No.114 of 2000 sought the relief of permanent injunction restraining the defendants from in any way interfering with the plaintiff's right to use the passage which is situate on the south of the suit property and for carrying out the repairs and maintenance of the southern wall, which is shown as ABCD in the plaint plan.

3. As could be seen from the averments made in the plaint, originally, the suit property along with the other property were owned by one Veera Gowder, the forefather of the plaintiff; that the

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said Veera Gowder had two sons, viz., Ramasamy Gowder and Rangaiyah Gowder; that Rangaiyah Gowder had two sons, viz., Venkatachalapathy Gowder, the father of the plaintiff, and Ramanatha Gowder; that after the death of Veera Gowder, the properties were partitioned between his sons under a Panchayat Muchalika dated 13.6.1929; that Ramasamy Gowder and his sons, Venkatachalapahy Gowder, the father of the plaintiff, and Ramanatha Gowder divided the said properties under a partition deed 11.06.1956; that under the said partition, the suit property was allotted to the father of the plaintiff; that after the death of his father, the plaintiff is exercising the rights of ownership; that he is in possession and enjoyment of the suit property; that the plaintiff has demolished the old structure; that he applied for approval of the building plan before Sirumugai Town Panchayat for the purpose of construction of a new building; that after getting approval, he has constructed the new building; that he has got the right to maintain his southern wall, which is shown as ABCD in the plaint plan, by white washing the same; that some space is provided in the property of the other party for the purpose of maintaining the said wall, as per the Panchayat Muchalika dated 13.6.1929; that the plaintiff and his predecessors are exercising the said right for more than 30 years by using the said passage for carrying out repairs and white washing the same; that the said right to use the said passage was also given to the plaintiff under the partition deed dated 11.6.1956; that the defendants are owning the property on the south of the suit property; that they started preventing the plaintiff from using the said passage for maintenance of ABCD wall and that the defendants had no manner of right to interfere with the plaintiff's right to use the passage for white washing and maintaining the ABCD wall and since, the defendants are interfering with the rights of the plaintiff in maintaining the said wall by using the passage, the plaintiff has filed the above suit.

4. The said suit was contested by the defendants inter alia stating that the plaintiff had no cause of action to file the suit or seek relief; that he demolished the old structure; that he got approval of a plan to be constructed in the said property; that he has neither made construction within his property nor constructed the same as per the plan; that the construction has been made by making encroachment into the property of the defendants; that there was no passage situate on the south of the plaintiff's suit property; that it has never been in use for the past and that all the allegations put forth in the plaint were false and untrue and thus, the plaintiff was not entitled for permanent injunction asked for.

5. O.S.No.6 of 2001 was filed by the second defendant in O.S.No.114 of 2000 seeking the relief of permanent injunction restraining the defendant in any way disturbing or interfering with the plaintiff's peaceful possession and enjoyment of the suit property mentioned in the schedule annexed to the plaint including

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from preventing the construction of the compound wall touching the defendant's building and also mandatory injunction directing the defendant to remove the newly constructed southern wall, which was abutting the suit property, measuring 17+13+21 feet, which is shown as LHGF in the sketch annexed to the plaint, and to put up a compound wall with provision of 2 meters open space within his property.

6. As could be seen from the averments made in the plaint, the plaintiff in O.S.No.6 of 2001 alleged as follows:-

The plaintiff is the absolute owner of the suit property by virtue of a partition deed dated 5.5.1997; that originally, a part of the suit property had been devolved upon the father of the plaintiff, viz., Varadharaja Gowder, under a partition deed dated 28.1.1966; that he purchased another part under a sale deed dated 11.12.1970 executed by one Bujingan; that it was an Oor Natham; that later, he obtained patta in the year 1995; that since the building in the suit property became ruined, the plaintiff demolished the entire structure; that he started constructing a new building; that the defendant herein is residing on the north of the suit property; that he also started constructing a new building; that he deviated the approved plan by constructing the southern side wall as rear wall, instead of a compound wall, though he obtained approval only for constructing a compound wall; that as per law or guidelines, 2 meters open space must be left out between the boundary compound wall or the rear side and the main building; that though the plaintiff made objections for such unlawful construction, the defendant finished construction with the help of rowdy elements by constructing the southern wall, shown as LHGF in the rough sketch annexed, to a height of about 13 feet; that he also put up three windows in the said wall, in spite of the objections made by the plaintiff as it is against his privacy; that since, the plaintiff objected the same, the defendant filed a suit in O.S.No.114 of 2000 against him for permanent injunction; that the Court appointed a Commissioner in O.S.No.114 of 2000, who visited the properties belonging to the plaintiff and the defendant on 16.9.2000, measured them and filed his report to the Court; that on 12.10.2000, after getting approval of a building plan, the plaintiff started constructing a new building and that on 31.12.2000, the defendant and his men have prevented construction of the compound wall touching the southern wall of the defendant by making unlawful objections and claiming right over the property belonging to the plaintiff and hence, the plaintiff filed O.S.No.6 of 2001 for permanent injunction and also mandatory injunction.

7. The suit was resisted by the defendant, who is the plaintiff in O.S.No.114 of 2000, inter alia stating that the suit itself has been filed as a counter blast to the suit filed by him in O.S.No.114 of 2000, wherein he sought permanent injunction restraining the defendants therein from interfering with his right

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to use the passage, which is situate on the south of the suit property for carrying out the repairs and maintenance of the southern wall shown as ABCD; that the defendant has constructed his house as per the plan approved by the authorities; that since there was no encroachment into the plaintiff's property, there is no question of any mandatory injunction for removal or leaving any space; that the defendant's construction was well within his land and that on the contrary, it was the plaintiff in this suit who prevented him from exercising his right to enter into the property for the purpose of repair and white washing on the south and hence, the suit was to be dismissed.

8. Both the suits were taken up for trial jointly. Necessary issues were framed by the learned District Munsif, Mettupalayam. On trial, the suit in O.S.No.114 of 2000 was decreed, while O.S.No.6 of 2001 was dismissed. Aggrieved over the same, the second defendant in O.S.No.114 of 2000 has preferred an appeal in A.S.No.142 of 2002, while on the dismissal of the suit in O.S.No.6 of 2001, the plaintiff preferred an appeal in A.S.No.141 of 2002. Both the appeals A.S.No.141 and 142 of 2002 were taken up for inquiry by the learned Additional District Judge, Coimbatore, and a common judgment was rendered confirming the judgments and decrees of the trial Court. Aggrieved over the same, the plaintiff in O.S.No.6 of 2001, who is the second defendant in O.S.No.114 of 2000, has brought forth these two second appeals.

9. At the time of admission, the following substantial questions of law were formulated by this Court:-

1. Whether the Courts below have committed error in decreeing the suit filed by the respondent when admittedly he constructed his new building in violation of the Panchayat Rules and the approved plan Ex.A-2?

2. Whether the Courts below have committed error in coming to the conclusion that the suit O.S.No.114 of 2000 filed by the respondent for bare injunction without the prayer of declaratory relief is maintainable in law?

3. Whether the Courts below have committed error in dismissing the suit O.S.No.6 of 2001 without considering the material evidence available on record?

At the time of admission, interim orders were sought for and the same has also been granted by this Court in C.M.P.No.12185 of 2003 in S.A.No.1370 of 2003 dated 8.4.2004.

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10. At the request made by both the counsels, the above two second appeals were taken up for consideration and the judgment is rendered as follows:-

As could be seen above, O.S.No.114 of 2000 was filed by the respondent in both the second appeals seeking a permanent injunction against the appellant that he should not interfere with the plaintiff/respondent's right to use the passage which is situate on the southern side of the suit property for carrying out the repairs and maintenance of the said southern wall shown as ABCD in the plaint plan. The appellant, who was shown as the second defendant in O.S.No.114 of 2000, has not only contested the suit denying the allegations found therein, but also has filed O.S.No.6 of 2001 seeking a relief of mandatory injunction and a permanent injunction as stated above.

11. The learned counsel on both sides were heard. All the materials available were also perused. The parties before the Courts below are owners of the adjacent properties. The property of the appellant is situate on the south, while the property of the respondent is on the north. In between them, there is a wall running east to west. It is not in controversy that this wall which is shown as ABCD in the plaint plan in O.S.No.114 of 2000 belonged to the respondent, who is plaintiff in O.S.No.114 of 2000. The controversy between the parties in short is as to the use of the space which was situate on the south of the wall by the plaintiff in O.S.No.114 of 2000 for the purpose of repairing and white washing the same. Though the plaintiff in O.S.No.6 of 2001 sought for a mandatory injunction for removal of the wall and a direction to the plaintiff in O.S.No.114 of 2000 for construction of a new wall leaving two meter space, at the time of admission before this Court, the appellant's counsel would submit that the relief of mandatory injunction as one asked for by the plaintiff in O.S.No.6 of 2001 is not pressed and hence, the Court need not go into the question of consideration of the same. What remains to be decided is as to the question of permanent injunction asked for by the plaintiff in O.S.No.114 of 2000 and against the defendants therein and the permanent injunction asked for by the plaintiff in O.S.No.6 of 2001 against the defendant therein. Admittedly, the wall which is shown as ABCD in O.S.No.114 of 2000 belonged to the plaintiff in O.S.No.114 of 2000. Under such circumstances, since relief of mandatory injunction has been dropped by the plaintiff in O.S.No.6 of 2001, there is no impediment for this Court in recording so that the wall belongs to the plaintiff in O.S.No.114 of 2000.

12. Now the controversy as could be seen above between the parties is as to the use of the space situate on the south of the wall by the plaintiff in O.S.No.114 of 2000 for the purpose of white washing and repairing. Both sides brought to the notice of the court a number of decisions. After hearing both sides, the Court is of the considered opinion that the grant of permanent injunction by

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the lower Court allowing the plaintiff in O.S.No.114 of 2000 to have entry into the property of the 2nd defendant therein, who is the appellant herein, throughout the year cannot be sustained. At the same time, the plaintiff in O.S.No.114 of 2000 has got to be allowed to use the customary right of the white washing and repairing his wall from south side. Under such circumstances, the original injunction order granted in favour of the plaintiff in O.S.No.114 of 2000 has got to be modified in such a way by allowing him to carry out the repair and white washing, but at the same time without causing any hindrance to the defendant, who is the appellant herein, and also not to infringe his right to the property.

13. Taking into consideration all the above, the Court is of the considered opinion that the plaintiff in O.S.No.114 of 2000 is permitted to enter into the property of the 2nd defendant therein, who is the appellant herein, twice, for four days and three days, totally seven days, throughout a year at two spells. The first spell commences from the month of June 15th, 16th , 17th and 18th (four days) and the second spell commences from the month of December 15th , 16th and 17th (three days). Except these days, the plaintiff in O.S.No.114 of 2000 cannot enter the property of the other party, who is the appellant herein and during those spells, he could either white wash or repair his wall or his property shown as ABCD in O.S.No.114 of 2000. In case of any emergency arises for the respondent to repair the wall, he could do so and carry out the repair, after giving seven days notice to the appellant.

14. The learned counsel for the respondent brought to the notice of the Court that since his property shown as ABCD in O.S.No.114 of 2000 requires immediate repair, sufficient time has got to be given for repairing the same in the near future. The Court also heard the Senior Counsel for the appellant. On taking into consideration the said fact, the respondent is permitted to carry out the repairs in his building, if any, within a period of three weeks from 18.09.2005.

15. With the above observations, the appeals are disposed of. Consequently, connected C.M.Ps. are closed. The parties are directed to bear their costs.

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Asst.Registrar

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Sub Asst.Registrar

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To
1. The II Additional District Judge,Coimbatore.

2. The District Munsif, Mettupalayam.

3. The Record Keeper, V.R.Section,
   High Court, Madras-104.

+1 CC to Mr.K.Kalyana Sundaram, Advocate, SR No.39189

+1 CC to Mr.Srinath Sridevan, Advocate, SR No.39358

PV(CO)
BG/22.09.2005.

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